HUATAH SDN BHD v. YAP CHEE KIAN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
S NANTHA BALAN J
[ORIGINATING SUMMONS NO. WA-24NCC-453-10-2017]
4 MARCH 2019

COMPANY LAW: *Winding-up – Liquidation – Fraudulent dealings by directors of company – Dissipation of company's assets and destruction of company's accounts and documents by directors – Whether documents and records deliberately destroyed – Allegation by directors of ignorance of s. 167(2) of Companies Act 1965 – Whether liquidator notified of destruction of documents – Whether act of destroying documents and records attracted adverse presumption that expenses incurred, payments to creditors and writing off of debts were manifestation of fraudulent trading by directors – Whether directors jointly and severally liable for debts of company*

The plaintiff and Billionz Showcase Sdn Bhd ('BSSB') entered into a licence agreement for the right to carry on a business under the Tai Lei Loi Kei ('TLLK') trademark ('the license agreement'). The plaintiff and BSSB also executed a supply agreement for the supply of products, furniture and equipment for the operation of the plaintiff's TLLK outlet. However, the plaintiff subsequently found out that BSSB was in breach of s. 6(1) of the Franchise Act 1998 ('FA') as it was not a registered franchisor in Malaysia and was therefore not entitled to sell the TLLK franchise to the plaintiff. Despite knowing that BSSB was not a registered franchisor in Malaysia, BSSB had proceeded to sell the TLLK franchise to the plaintiff and collected license and royalty fees from the plaintiff. It was thus alleged that the defendants had, by deceit, induced the plaintiff into believing that BSSB had the authority to sell the TLLK franchise and to enter into the license agreement and supply agreement. Hence, the plaintiff filed an action against BSSB in the Sessions Court ('OS46') seeking, among others, a declaration that the license agreement and supply agreement were collectively a franchise agreement which was void for non-registration as a franchisor under the FA and an order for restitution of all monies paid to BSSB. The Sessions Court allowed the plaintiff's claim. BSSB appealed to the High Court but the appeal was dismissed. The plaintiff concurrently filed a winding-up petition against BSSB, which was allowed. However, the plaintiff subsequently discovered that the statements of account of BSSB that had been provided to the liquidator was totally inaccurate, leading to the filing of an application pursuant to ss. 248 and 249 of the Companies Act 1965 ('CA') to cross-examine the directors of BSSB. During the cross-examination, it was found, among others, that the statement of account was not an accurate reflection of BSSB's financial affairs and that the defendants had disposed of all the books, records and accounts of BSSB. Hence, the present action, wherein the plaintiff alleged that the defendants, as directors of BSSB, sought to keep their fraudulent dealings secret by: (i) providing inaccurate information to the liquidator who was appointed to take control of the company's affairs; and

(ii) destroying all of the company's accounts and documents in breach of their statutory duty. The plaintiff sought, among others, a declaration that the defendants were jointly and severally liable for all the debts of BSSB to the plaintiff. The defendants, in response, averred that they were not aware of the statutory obligation under s. 167(2) of the CA to keep the records of BSSB.

Held (allowing application):

(1) There was a statutory obligation on the part of the company to retain and preserve the books and records of BSSB for seven years. Although the defendants, through D4, averred that they were unaware of the requirement under s. 167(2) of the CA, D4 nevertheless admitted, during cross-examination, that he was aware of the statutory requirement that documents and records must be kept for seven years. Clearly, D4 was not ignorant of the law. (paras 54 & 60)

(2) If the defendants did not want to keep or could no longer keep or store the documents, at the very least, they should have informed the liquidator. Although the defendants contended that they proceeded to destroy the books and records of BSSB as they were told by the liquidator that everything was in order, there was no evidence to that effect. Further, there was no evidence to substantiate the averment that the documents and accounts of BSSB had been destroyed due to the relocation of BSSB's offices. There was also no evidence to show that the documents and accounts could not have been kept on the premises or offices of the defendants or on the number of documents and accounts being held by BSSB from its operations, which were only for approximately two to three years. (paras 55, 61 & 62)

(3) The BSSB's directors' acts of destroying all the documents and records of the company raised a 'red flag' of deep suspicion, where no paper trail could be done since there were no documents available. Nevertheless, the defendants were urging the court to conclude that there was nothing sinister in their actions. Had the documents and records been kept intact, at the very least, they would have enabled the liquidator to verify the expenses that were incurred and take steps to recover monies from all the debtors. It was also peculiar that the defendants had unilaterally decided to write off the debts owed to BSSB. In the absence of the documents and accounts, the so-called balance sheet remained merely as an 'unaudited' piece of document which was not capable of any verification by the liquidator. (paras 58 & 63)

(4) The liquidator also could not take action against BSSB's debtors to recover monies to satisfy the Sessions Court judgment since the relevant evidence to substantiate any claim had all been destroyed at the hands of the defendants. Based on the destruction of the books and records of BSSB, an adverse presumption ought to be inferred against the defendants, namely that the exorbitant expenses incurred by BSSB, the alleged payments made to all creditors, except the plaintiff, and the

writing off of debts owed to BSSB, were a manifestation of fraudulent trading by the defendants. The inference to be drawn was that the books and records of BSSB were deliberately destroyed by the defendants to hinder and prevent the liquidator from ascertaining the truth as regards the financial affairs of BSSB and to verify the balance sheet and the reasonableness of the expenses that were incurred. (paras 64 & 65)

Case(s) referred to:
Cekap Container Sdn Bhd v. Lim Soon Peng & Ors [2015] 1 LNS 154 HC ***(refd)***
Chin Chee Keong v. Toling Corporation (M) Sdn Bhd [2016] 6 CLJ 666 CA ***(refd)***
Fairview Schools Bhd v. Indrani Rajaratnam & Ors [1998] 1 CLJ 285 CA ***(refd)***
JCT Ltd v. Muniandy Nadasan & Ors and Another Appeal [2016] 3 CLJ 692 CA ***(refd)***
Kuthubul Zaman Bukhari & Anor v. Tsai Su Chu & Ors [2013] 9 CLJ 524 HC ***(refd)***
LMW Electronics Pte Ltd v. Ang Chuang Juay & Ors [2010] 4 CLJ 849 HC ***(refd)***
Malhotra v. Dhawan [1997] EWCA Civ 1096 ***(refd)***
Re William C Leitch Bros Ltd (No 1) [1932] 2 Ch 71 ***(refd)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***
Tradewinds Properties Sdn Bhd v. Zulhkiple A Bakar & Ors [2019] 2 CLJ 261 CA ***(refd)***

Legislation referred to:
Companies Act 1965 (repealed), ss. 167(2), 248, 249
Companies Act 2016, ss. 245(3) (9), 484, 540(1)
Franchise Act 1998, s. 6(1)

For the plaintiff - Nimalan Devaraja & Joyce Lim; M/s Skrine
For the defendants - Chin Tzi Song; M/s Arifin & Partners

Reported by S Barathi

JUDGMENT

S Nantha Balan J:

Introduction

[1] The plaintiff is a judgment creditor of a company (the judgment debtor). The judgment debtor was unable to satisfy the judgment debt and was consequently wound up. The judgment debt remains unsatisfied to-date. The plaintiff describes the present case as one which concerns the manner in which the plaintiff, as a judgment creditor, was deprived of enjoying the fruits of its litigation (a judgment debt) due to the calculated dissipation of the judgment debtor's assets by the directors of the judgment debtor and active concealment of the financial affairs of the judgment debtor by the destruction of the books and records. Thus, the plaintiff's present application is targeted at the directors of the judgment debtor. And in this regard, it is alleged by the plaintiff that with the judgment debtor having been wound up, the directors of the company have sought to keep their fraudulent dealings secret by:

(i) first, providing inaccurate information to the liquidator who was appointed to take control of the company's affairs; and

(ii) then, destroying all of the company's accounts and documents in breach of their statutory duty.

[2] The matter before me is an application by Huatah Sdn Bhd (Co. No. 1087-H) *via* Originating Summons No. WA-24NCC-453-10-2017 dated 24 October 2017 ("OS453") for the following orders (jointly and severally) against the defendants (as directors of Billionz Showcase Sdn Bhd (Co. No. 1018166-P) (in liquidation) – "BSSB") namely:

(1) A declaration that the defendants are jointly and severally liable to the plaintiff for all debts of Billionz Showcase Sdn Bhd (Company No. 1018166-P) (in liquidation) ("the Company") pursuant to:

(a) the Sessions Court Order dated 20.1.2015 (Originating Summons No. B54-46-09-2014) ("Sessions Court Order");

(b) the High Court Order dated 22.5.2015 (Civil Appeal No. 12ANCVC-6-01/2015 ("High Court Order"); and

(c) the Winding Up Order dated 22.5.2015 (Companies (Winding-Up) No. 28NCC-178-03/2015) ("Winding Up Order");

(2) That the defendants make payment of all debts of BSSB pursuant to the Sessions Court Order, High Court Order and Winding Up Order to the Plaintiff within one (1) month days from the date of service of this Order;

(3) Costs of this application be paid by the defendants jointly and severally to the plaintiff on the indemnity basis; and

(4) Any further and/or reliefs deemed fit and just by this Honourable Court.

The License Agreement – Null And Void

[3] On 26 June 2013, the plaintiff and BSSB entered into a licence agreement for the right to carry on a business under the Tai Lei Loi Kei ("TLLK") trademark ("the license agreement"). The plaintiff and BSSB also executed a supply agreement dated 26 June 2013 ("the supply agreement") for the supply of products, furniture and equipment for the operation of the plaintiff's TLLK outlet. The plaintiff had carried out its obligations under the license agreement and supply agreement on the basis that the agreements are collectively a franchise agreement as the "franchise", "franchisee" and "franchisor" were often used by both parties. Further, the conduct of the parties showed that the relationship between the parties was one of a franchisee and franchisor.

[4] The plaintiff was, at all material times, under the impression that BSSB was authorised to sell the TLLK franchise to the plaintiff. However, on or about June 2014, the plaintiff found out that BSSB was in breach of s. 6(1) of the Franchise Act 1998 ("FA 1998") as it was not a registered franchisor in Malaysia and was therefore not entitled to sell the TLLK franchise to the plaintiff.

[5] It is alleged that despite knowing that BSSB was not a registered franchisor in Malaysia, BSSB had proceeded to sell the TLLK franchise to the plaintiff and collected license and royalty fees from the plaintiff. It is

alleged that the defendants had by deceit, induced the plaintiff into believing that BSSB had the authority to sell the TLLK franchise and to enter into the license agreement and supply agreement.

[6] On 22 September 2014, the plaintiff filed an action against BSSB *via* Kuala Lumpur Sessions Court Originating Summons No. B54-46-09-2014 ("OS46"), seeking, among others, a declaration that the license agreement and supply agreement were collectively a franchise agreement which was void for non-registration as a franchisor under the FA 1998, and an order for restitution of all monies paid to BSSB.

Court Orders Against BSSB

[7] On 20 January 2015, the Sessions Court allowed the claim per OS46 and BSSB was accordingly ordered to pay RM405,141.04 plus RM5,000 (costs) to the plaintiff ("the SC judgment"). BSSB appealed to the High Court *via* Kuala Lumpur High Court Civil Appeal No. 12ANCVC-6-0l-2015. On 22 May 2015, BSSB's appeal was dismissed and the SC judgment was upheld by the High Court. The High Court also ordered costs of RM5,000 to be paid by BSSB ("HCt costs"). Concurrently, the plaintiff had filed a winding-up petition against BSSB on 12 March 2015 *via* Kuala Lumpur Companies Winding Up Petition No. 28NCC-178-03-2016 ("winding-up petition"). The winding-up petition was allowed on 22 May 2015. And BSSB was ordered to pay costs of RM8,000 to the plaintiff ("winding-up costs")

Disposal Of BSSB's Assets Post-Filing Of OS46

[8] According to the plaintiff, subsequent to the filing of OS46 in 2014, the defendants had proceeded to dispose of a substantial portion of the assets of BSSB at "fire sale" prices which caused BSSB to suffer significant losses. The plaintiff relies on the following as evidence of such dishonest conduct by the defendants:

(i) based on BSSB's trading profit and loss statement for the period from 1 April 2014 to 31 March 2015 ("P&L statement"), the defendants disposed of BSSB's plant, property and equipment in a fire sale manner, causing BSSB to suffer a loss of RM724,351.98;

(ii) the total value of the computers, air-conditioners, cold room and plant and machinery of BSSB as at 31 March 2014 was RM260,434. However, the defendants sold these items for a mere sum of RM60,000, thereby causing BSSB to suffer a loss of RM200,434; and

(iii) the total value of BSSB's motor vehicles as at 31 March 2014 was RM119,675. However, the defendants sold these motor vehicles at a total of RM62,000, causing BSSB to suffer a loss of RM57,675. The defendants had also admitted to having caused a motor vehicle (Perodua Viva-WJY 7925), purchased by BSSB, to be registered under the name of the fourth defendant and thereafter having gifted the said motor vehicle to an unnamed employee of BSSB in early 2015 without consideration.

[9] Further, the fourth defendant ("D4") had admitted during the cross-examination hearing on 18 October 2018 that by 31 March 2015, BSSB had disposed of all its assets, and for all intent and purposes, was a "dead" company. This is contrary to the defendants' averment that despite the decline in business since 2014, BSSB had continued its business operations in the hope of bringing the business back on track.

[10] None of the meagre proceeds received by BSSB from the fire sale of its assets were used to pay any part of the SC judgment, despite the defendants having full knowledge of the plaintiff's status as a creditor of BSSB.

[11] Further, D4 had acknowledged that the proceeds were purportedly used to pay other creditors of BSSB. According to the plaintiff, the fact that the defendants paid other creditors of BSSB except the plaintiff, despite the court orders made against BSSB, shows an intent to defraud the plaintiff of the SC judgment.

High Expenses Incurred To Render BSSB Unprofitable And Unable To Pay Its Debts

[12] The plaintiff contends that OS46, the SC judgment, HCt costs, the winding-up petition and the winding-up costs, coupled with the significant decline in BSSB's business since early 2014, were strong reasons for the defendants to refrain from incurring high expenses, since doing so would defeat the plaintiff's right as a creditor. However, the defendants nevertheless proceeded to incur high expenses which eventually rendered BSSB being unable to pay its debts to the plaintiff. Based on the P&L statement, the defendants had caused BSSB to incur a total amount of RM1,963,840.12. There were also additional expenses amounting to RM171,902.42 which were not incurred in the previous year during which BSSB had been fully operational.

[13] Based on BSSB's balance sheet as at 31 March 2014, BSSB's net current liabilities had already exceeded the net current assets by RM437,678. D4 made a statutory declaration in BSSB's annual report and financial statements for the year ending 31 March 2014 to declare that the financial statements were "to the best of [his] knowledge and belief correct". The first defendant ("D1") and D4 also made a statement by directors to state that the financial statements were drawn up to "give a true and fair view of the state of affairs of BSSB as at 31 March 2014".

[14] This means that the defendants had knowledge of the dire financial situation of BSSB and ought to have refrained from continuing to incur high expenses. Further, despite the significant decline in BSSB's business since early 2014, the directors' yearly remuneration for 2014 and 2015 were strikingly similar and substantial (RM445,240 for 2014, and RM446,880 for 2015).

[15] In the circumstances, the plaintiff contends that the defendants had intended to render BSSB unprofitable in order to defeat the rights of the plaintiff by causing BSSB to incur high expenses since the filing of OS46 despite having admitted that BSSB had been suffering a significant decline in business since 2014, and by disposing of all the assets of BSSB at fire-sale prices, causing BSSB for all intent and purposes, to be a "dead" company.

Submission Of A False And Misleading Statement Of Affairs To BSSB's Liquidator

[16] The next issue is with regard to the disclosure of the true financial position of BSSB. In this regard, the plaintiff contends that the defendants had a statutory obligation pursuant to s. 484 of the Companies Act 2016 to include the following information about BSSB in the statement of affairs ("SOA"):

(i) the particulars of its assets, debts and liabilities;

(ii) the names and addresses of its creditors;

(iii) the securities held by the creditors respectively;

(iv) the dates when the securities were respectively given; and

(v) such further information as is prescribed or as the liquidator requires.

[17] Section 484 of the Companies Act 2016 reads as:

484. Submission of statement of affairs of company

(1) A statement as to the affairs of the company as at the date of the winding up order showing-

(a) the particulars of its assets, debts and liabilities;

(b) the names and addresses of its creditors;

(c) the securities held by the creditors respectively;

(d) the dates when the securities were respectively given; and

(e) such further information as is prescribed or as the liquidator requires, shall be made by one or more persons in subsection (2) and verified in the manner as may be determined by the Registrar and submitted to the liquidator.

(2) The statement in subsection (1) shall be made and submitted by one or more of the persons who are at the date of the winding up order, the directors and by the secretary of the company, or by any of the following persons as the liquidator may require, subject to the direction of the Court:

(a) a person who is or has been an officer of the company;

(b) a person who has taken part in the formation of the company, at any time within one year before the date of the winding up order; or

(c) a person who is or has been within that period, officers of or in the employment of a corporation which is, or within that period was, an officer of the company to which the statement relates.

(3) The statement in subsection (1) shall be submitted within fourteen days from the date of the winding up order or within such extended time as the liquidator or the Court for special reasons specified.

(4) Within seven days from the receipt of the statement in subsection (2)

(a) the liquidator including the Official Receiver shall cause a copy of the statement to be filed with the Court and lodged with the Registrar; and

(b) where the Official Receiver is not the liquidator, the liquidator shall cause a copy of the statement to be lodged with the Official Receiver.

(5) Any person making or concurring in making the statement required by this section may, subject to the rules, be allowed and be paid out of the assets of the company such costs and expenses incurred in the preparation and the making of the statement as the liquidator considers reasonable subject to an appeal to the Court.

(6) Any person who contravenes the requirements of this section commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding three years or to a fine not exceeding one hundred thousand ringgit or to both and in the case of a continuing offence, to a further fine not exceeding five hundred ringgit for each day during which the offence continues after conviction.

[18] Despite the statutory obligation to provide the requisite information and particulars pertaining to the financial position of BSSB, the SOA which was filed by the defendants to the liquidator indicated that BSSB has no debts, liabilities, debtors and/or assets. Further, the SOA states that BSSB only had cash in bank of RM1,496.76. This is false and misleading as:

(i) based on the balance sheet as at 31 March 2015 ("balance sheet"), BSSB had current assets in the sum of RM471,355.47 and current liabilities in the sum of RM817,284.19. This was not stated in the SOA;

(ii) based on the creditor balance and debtor balance as at 31 March 2015 ("creditor and debtor balance"), BSSB had 13 debtors where the total debt amount was RM437,348.71, and 29 creditors where the total amount owing was RM94,711.98; and

(iii) the plaintiff was a judgment creditor of BSSB but there was no record of the plaintiff's status and BSSB's debt to the plaintiff in the SOA.

[19] The SC judgment, the HCt costs and the winding-up costs remain unpaid. The plaintiff alleges the defendants had carried out the business of BSSB with intention to defraud the plaintiff and/or for fraudulent purpose and seeks reliefs under s. 540(1) of the Companies Act 2016 to hold the defendants (as directors of BSSB) liable for the financial liabilities of BSSB to the plaintiff.

[20] To summarise, the plaintiff's complaint is that on 22 May 2015, the plaintiff wound up BSSB for its failure to pay the SC judgment. The official receiver was appointed as the liquidator for BSSB ("the liquidator").

[21] However, the plaintiff subsequently discovered that the SOA of BSSB as at 22 May 2015 (dated 7 October 2015) that had been provided to the liquidator, was totally inaccurate, especially when compared to the financial statements of BSSB. This led to the plaintiff filing an application pursuant to ss. 248 and 249 of the Companies Act 1965 to cross-examine the directors of BSSB. During the cross-examination of the directors, it was revealed, among others, that the SOA was not an accurate reflection of BSSB's financial affairs, and the defendants had disposed of all the books, records and accounts of BSSB.

[22] Armed with this newly-obtained information, the plaintiff filed OS453 premised on a claim for fraudulent trading, under s. 540(1) of the Companies Act 2016 against the directors of BSSB. The plaintiff is seeking for, among others, a declaration that the defendants are jointly and severally liable for all debts of BSSB to the plaintiff. Section 540(1) of the Companies Act 2016 reads as:

> **540. Responsibility for fraudulent trading**
>
> (1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud the creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if the Court thinks proper so to do, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

[23] Based on the above, it is alleged that the business of BSSB had been carried on with intent to defraud the plaintiff as a creditor of BSSB or for a fraudulent purpose, and that the defendants were knowingly a party to BSSB's carrying on of the business in that manner (*Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn v. Bhd* [2015] 7 CLJ 584; [2015] 5 MLJ 1 (FC); *Chin Chee Keong v. Toling Corporation (M) Sdn Bhd* [2016] 6 CLJ 666; [2016] 3 MLJ 479 CA). The plaintiff contends that the defendants' culpability or liability under s. 540(1) of the Companies Act 2016 can be inferred from the following circumstances and conduct:

(i) the defendants had disposed of a substantial portion of the assets of BSSB at fire-sale prices after the OS46 was filed. This caused BSSB to suffer significant losses which rendered BSSB being unable to pay its debts to the plaintiff;

(ii) the defendants had failed to use any of the proceeds from the disposal of assets of BSSB to pay its debts to the plaintiff. Instead, the defendants had admitted to having paid off the rest of BSSB's creditors to the detriment of the plaintiff;

(iii) despite knowing that the plaintiff is a creditor of BSSB and that BSSB was suffering from a drastic decline in business since early 2014, the defendants had caused BSSB to continue to incur unsubstantiated high expenses to render BSSB unprofitable and to defeat the rights of the plaintiff as a creditor;

(iv) the defendants had submitted the SOA to the liquidator, knowing that the information contained therein was inaccurate and misleading. This resulted in the liquidator being unable to determine the true financial position of BSSB, which is crucial to the liquidation process; and

(v) to further conceal the defendants' above conduct, and the true financial position of BSSB, the defendants had disposed of all the books and records of BSSB in breach of their statutory obligations.

[24] Due to the failure of the defendants to provide a true and accurate SOA, the liquidator was unable to determine the financial position of BSSB, which is crucial to the liquidation process of BSSB. The defendants' intention to conceal the true financial position of BSSB is fortified by D4's acknowledgement on the following matters:

(i) that it was the responsibility of the defendants, as directors of BSSB, to file the SOA, and that the liquidator would only be aware of the true financial affairs of BSSB based on the SOA;

(ii) D4 was unable to confirm the accuracy of the SOA;

(iii) that the plaintiff was a creditor of BSSB at the time the SOA was filed, but there was no record of the plaintiff's status as a creditor and the SC judgment owed by BSSB in the SOA; and

(iv) that the information provided in the SOA does not reflect the information in the balance sheet, P&L statement, and creditor and debtor balance of BSSB.

Disposal Of The Books And Records – Concealment Of BSSB's True Financial Position

[25] It is an undisputed fact that the defendants had failed to ensure that the accounts and records of BSSB are kept for seven years after the completion of the transactions to sufficiently explain the transactions and financial position of BSSB. This is in breach of s. 245(3) of the Companies Act 2016, which reads:

245. Accounts to be kept

...

...

(3) The company **shall retain the records** referred to in subsection (1) for **seven years after the completion of the transactions** or operations to which the entries relate. (emphasis added)

[26] I turn now to the critical points that were made by the defendants per D4's affidavit in reply (encl. 12) in response to the plaintiff's charge of dishonest conduct. In encl. 12, D4 made the following averments:

16. ... due to drastic decline in business which had severely affected the Company's cash flow, the Company had also suffered losses and simply did not have the funds to pay the judgment sum.

...

35. ... Although the plaintiff had given up the Business due to drastic decline in business and commenced the Civil Suit, the Company had continued operation of the Business despite the suffering losses since 2014, as the Company hope to bring the Business back on track and as well as other licensees wanted to continue with the Business. The Defendants did not intentionally incur debts and/or high expenses with the intention to defeat the right of the Plaintiff.

36. ... The expenses were legitimate and incurred over a period of a year and were not exorbitant. Counsel for the Defendant will refer and submit on the Annual Report and Financial Statements for the Year ended 31.3.2014 and the Trading Profit and Loss Statement for period ending 31.5.2015 at hearing.

38. ... the Plaintiff had obtained an order to wind up the Company on 22.5.2015 and the Statement of Affairs was filed on or around 13.10.2015. However, the Plaintiff had only obtained an order to examine the Defendants after 16 months from the Winding Up Order. By that time the Company secretary and/or accountant had already handover the books and records of the Company to the Official Receiver and the Defendants could no longer remember what documents were forwarded and in the custody and possession of the Official Receiver. The Plaintiff's allegation that the Defendants had disposed all books and records of the Company is inaccurate. Counsel for the Defendants will submit on this at hearing.

39. ... The Defendants had never intended to conceal the financial position of the Company. The estimate financial position of the Company prior to liquidation was as per the Trading Profit and Loss Statement for period ending 31.5.2015. Counsel for the Defendants will submit on this at hearing.

A 40. ... The Company had complied with the law by filing the Statement of Affairs with the Official Receiver. At all material time, the Official Receiver had interviewed me and I was not informed that the Statement of Affairs is inaccurate and the Company was required to submit further documents. I was then made to understand and truly believe that everything was in order. I was only made to
B understand by the Plaintiff's counsel during the examination on 10.3.2017 that the Statement of Affairs filed was inaccurate.

41. ...The Company and/or the Defendants had handed over most of the books, records and accounts of the Company to the Official Receiver and the Defendants did not disposed all books and records
C alleged by the Plaintiff. I was informed by the Official Receiver during the interview that everything was in order and the Defendants honestly believe that there was no necessity to retain books and records which were not asked by the Official Receiver, as the Company had been suffering losses and ordered to wound up and no longer afford to pay storage rental for documents not
D requested by the Official Receiver.

42. In addition to the above, I refer to paragraph 45 of Affidavit CKL 1 and state that **the Defendants were honestly not aware of the provision in section 167(2) of the Companies Act 1965**. I was also not informed by the Official Receiver during the said interview as
E to the provision in section 167(2) of the Companies Act 1965. I am advised by my solicitors and verily believe that the provisions in Companies Act 2016 do not apply to the Company and the Defendants, and counsel for the Defendants will submit on this point at hearing.

F 43. ... The Company was wound up on 22.5.2015 and the Defendants were only examined on 10.3.2017, after almost 2 years from the Winding Up Order, and the Defendants and I are genuinely and honestly could no longer remember the transactions which had taken place between 1.4.2014 to 31.3.2015. (emphasis added)

[27] However, the plaintiff says that the defendants' averment that they
G were not aware of the statutory obligation per s. 167(2) of the Companies Act 1965 (which is *pari materia* with s. 245(3) of the Companies Act 2016) to keep the records of BSSB is plainly inaccurate. This is evident from D4's acknowledgement during cross-examination that he was aware that there is such an obligation under the Companies Act 2016. In this regard, D4's
H answers during cross-examination were as follows:

NDE Mr Kee, if I could now refer you to page 228 of Enclosure 2, if I could refer you to the top, this is the notes of proceedings of your earlier cross-examination under the winding up petition, can I confirm that you were asked whether you destroyed a lot of
I accounts records because of your move.

KEE Yes.

NDE And your answer was, *because we don't have to audit anymore, so we don't keep the file anymore and it's quite a big space, and we don't have room to put anywhere, so we disposed everything.*

KEE Yes.

NDE So you would agree then that *the directors of the company had disposed the books of records of the company when they moved premises.*

KEE Well because, we have a room storage for files and it's quite a lot because there are 20 outlet of files to store, daily transactions and invoices, sales orders and all, purchase order and all that. So, basically when we ...

NDE Mr Kee, if I can just stop you there. *Were the books of records disposed of?*

KEE Yes.

NDE And you will therefore agree. Sorry, before that, were *you aware that under the Companies Act there is obligation upon directors to keep the books of records of a company for a certain period of time?*

KEE *Yes, I am aware of this.*

NDE Okay, thank you Mr Kee. And my last question on this point, Mr Kee, you would agree that since the directors had now disposed the books and records of the company, the expenses of the company as set out in the balance sheet of 31 March 2015 are unsubstantiated. There are no supporting documents for all these amounts listed in the balance sheet.

KEE Erm, well, because this end of March 2015 account was done by our accountant. During that time, we still have all the statement of affairs.

NDE But, sorry Mr Kee, if I May. You would agree that before the court now, all *these expenses and amounts, there are no supporting documents for them.*

KEE Oh, *currently there's none.* Yes, yes. There's no supporting documents.

NDE And as you mentioned earlier, *this balance sheet was never audited.*

KEE Yes. It was *never audited.* (emphasis added)

[28] The plaintiff says that the defendants' alleged ignorance of the law is a blatant attempt to conceal the fact that the disposal of the books and records of BSSB before the lapse of the statutory period of seven years was intentional to conceal the true financial position of BSSB. This is especially as the defendants had already submitted inaccurate information to the liquidator *via* the SOA.

[29] In any event, it was submitted that ignorance of the law is not a defence (*Fairview Schools Bhd v. Indrani Rajaratnam & Ors* [1998] 1 CLJ 285; [1998] 1 MLJ 110 (CA); *Cekap Container Sdn Bhd v. Lim Soon Peng & Ors* [2015] 1 LNS 154; [2015] MLJU 100 (HC)).

[30] The plaintiff contends that the defendants' decision to dispose of the books and records of BSSB had "come back to bite them". The defendants had averred that the additional expenses in the sum of RM171,902.42 incurred by BSSB as at 31 March 2015 (which were not incurred in the previous year) were reasonable. However, D4 had admitted that there is no way of substantiating these expenses as the books and records of BSSB have been disposed of. In this regard, D4 said during cross- examination, "... there is no way for me to explain (these expenses), since the documentation have been disposed".

Fraudulent Trading – The Law

[31] Fraudulent trading is governed by s. 540(1) of the Companies Act 2016. It must be proved that:

(i) the business of BSSB has been carried out with intent to defraud creditors, or for any fraudulent purpose; and

(ii) the defendants were knowingly parties to the company's carrying on of the business in that manner with intent to defraud creditors or for any fraudulent purpose.

[32] It was submitted for the plaintiff that whether there was intent to defraud or to carry out any fraudulent purpose is a question of fact to be inferred from the surrounding circumstances and the subsequent conduct of the defendants, especially the concealment of material facts (*LMW Electronics Pte Ltd v. Ang Chuang Juay & Ors* [2010] 4 CLJ 849; [2010] 1 MLJ 185 (HC)).

[33] There need not be evidence of a scheme to defraud the company's creditors. In the Court of Appeal case of *JCT Ltd v. Muniandy Nadasan & Ors and Another Appeal* [2016] 3 CLJ 692; [2016] 6 MLJ 635 CA, it was held that a single act of doing the company's business to defraud the company's creditors is sufficient to trigger fraudulent trading.

[34] In the English High Court case of *Re William C Leitch Bros Ltd (No 1)* [1932] 2 Ch 71, it was held that carrying on business with intention to defraud means that a company continues to carry on a business and incurs debts at a time when there is, to the knowledge of the directors, no reasonable prospect of the creditors ever receiving payment of those debts.

[35] In the Court of Appeal case of *Chin Chee Keong v. Toling Corporation (M) Sdn Bhd* [2016] 6 CLJ 666; [2016] 3 MLJ 479 CA, the Court of Appeal held that the intention of the defendants to defraud the plaintiff can be inferred from the fact that the company did not have a profit-generating business at the material time but yet placed unusually large orders without explaining how they were going to honour the company's obligations.

[36] In *Kuthubul Zaman Bukhari & Anor v. Tsai Su Chu & Ors* [2013] 9 CLJ 524, the court found the defendants therein had intended to defraud the creditors when they dissipated the assets of the company and the court arrived at that finding because the company was not facing or suffering from any financial hardship. At p. 529 the court held as follows:

> As pointed out by P, D9 had not faced any downturn in its business or ceased operations. However, the manner in which the assets totalling RM2,900,000 (cash of RM2,400,000 and inventory stock of RMS00,000) were dissipated within a short span of time called into question the motive behind the move. There was no plausible reason to deal with remaining assets and funds of D9 in such a suspicious manner other than to deprive P of any claim that may arise in due course.

[37] In the recent Court of Appeal case of *Tradewinds Properties Sdn Bhd v. Zulhkiple A Bakar & Ors* [2019] 2 CLJ 261; [2018] MLJU 1025 CA, it was held that there was an intention to defraud when the first defendant (director of the second and third defendants) passed resolutions to reassign the second defendant's future earnings to the third defendant, resulting in the second defendant becoming a dormant company with no assets and therefore unable to pay its judgment debts to the plaintiff.

[38] In the present case, the defendants sought to defend themselves, *inter alia*, by contending that the plaintiff does not have direct evidence to prove the alleged dishonesty. As such, the plaintiff can only infer the alleged misfeasance from the surrounding circumstances.

Expenses Incurred Were Lower Than Previous Year

[39] In so far as the allegation of high expenses is concerned, the defendants say that the total administrative expenses and other operating expenses for the period ending 31 March 2015 were in fact lower by RM445,102.88 than the previous financial year ended 31 March 2014.

[40] According to the defendants' the total expenses of BSSB for period ending 31 March 2015 was lower than the previous financial year and this proved that the defendants did not intentionally incur high expenses to defeat the rights of the plaintiff as creditor of the company.

Disposal Of Assets To Mitigate Losses

[41] The defendants also contend that the total expenses of RM1,963,943 for period ending 31 March 2015 also included the losses suffered by BSSB from disposal of tangible and intangible property, plant and equipment amounting to RM724,351.98.

[42] And due to the drastic decline in business, the defendants had to dispose BSSB's property plant and equipment at the central kitchen as BSSB and/or the defendants could no longer sustain the constant huge losses incurred by the central kitchen.

[43] D4's evidence under cross-examination with regard to disposal of the central kitchen was:

NDE: Yes. In that case, Mr Kee, why was BSSB disposing of its property, plant and equipment at such a huge loss? On one hand, you want to continue with the business of the company, on the other hand, you seemed to be having a fire sale of all the assets of the company.

KEE: Err, there is because our business revenue comes from all these outlets. When the outlets close, they wouldn't close even when they are breakeven stage, I mean from their outlet revenue.

NDE: OK.

KEE: So, eventually we couldn't force them to close also. So, even at breakeven stage, after they have invested so much in the business, they wouldn't close. Our licensee will only close when they cannot sustain the outlet anymore. So basically, the number of outlets, err, pertaining at the end of year ...

YA: Our? Our what? Our licensee?

KEE: Our licensee will only close when they cannot sustain the business anymore, normally they will bear losses for probably 3 to 6 months before they decided to close. Even at breakeven stage also, they wouldn't want to close. Because they would want to try their best to err, improve the business. At the end of the year, 2015, by that period, I think 95% of the outlet had already closed down. Yes, so that is the reason that we cannot sustain the central kitchen anymore. Because when we first operate the business, we did not have central kitchen.

NDE: OK.

KEE: After I think the 4th or 5th outlet only we started central kitchen. Because if there are less than 3 outlets, we do not need a central kitchen to operate. We can get our supplier to send directly to the outlet.

NDE: OK.

KEE: So, the central kitchen was incurring a high cost and every month we are facing losses and the directors couldn't pump in any more money and we still have to pay off the creditors and also, we got our factory rental and all that and... we try to rid of the factory but, to get rid of the factory we have to reinstate back to the original condition and we also signed a contract with the factory owner.

I think we signed for 3 years contract, so I think at that time, we still got 1 year plus contract with them. So, we are on the loss at that time, and we were trying to close it down as soon as possible.

[Exhibit LHY-1 of Plaintiff's Further Affidavit affirmed on 4.12.2018 – pp. 20-21]

NDE: Thank you, Mr Kee. So, just to confirm with you, just to round up what you have testified so far, the directors of BSSB had made a decision to essentially leave BSSB in that rift before BSSB was wound up, will that be correct? You made a decision to sell all your major assets of the company?

KEE: Yea, we have already decided. I mean we planned that when 70 - 80% of the outlets closed.

NDE: OK. So, you have decided to dispose ....

KEE: Less than 5 outlets that time we already start to plan to shut off the central kitchen and run it like how we started before, just get the supplier to send goods, we don't need the central kitchen to operate anymore.

[Exhibit LHY-1 of Plaintiff's Further Affidavit affirmed on 4th December, 2018 - p23]

[44] In the present case, the defendants say that the TLLK business was declining drastically and everyone was suffering losses. The defendants had to take action to cut their losses by disposing the central kitchen which contained the property plant and equipment. Thus, they contend that the disposal of BSSB's property, plant and equipment was part of a genuine attempt to cut losses. Notwithstanding the disposal of the central kitchen and lorries, BSSB could still operate the business and serve the other licensees by directing suppliers to make direct supply.

Unintentional Disposal Of Books And Accounts

[45] According to the defendants, they had forwarded all relevant books and accounts of BSSB to the liquidator and D4 was informed by the liquidator that everything was in order and did not request for further books and records of BSSB. As BSSB had been put into liquidation and was no longer capable of paying rental, the books and records of BSSB which were not requested by the liquidator was disposed of. The plaintiff had only obtained an order to examine the defendants after more than a year BSSB was wound up and by which time, the books and records of BSSB had been disposed of.

[46] Thus, the defendants contend that the situation here was a genuine case of a drastic decline in business due to market forces causing BSSB to suffer huge losses. At all material times, BSSB and/or the defendants had to cut losses in disposing of the central kitchen. And taking into account all the surrounding circumstances, the defendants urged the court to find that they had never carried out the business of BSSB with the intention to defraud and/or to defeat the plaintiff's rights as judgment creditor of BSSB.

[47] However, according to the plaintiff, the defendants' conduct in disposing of the books and records of BSSB is most sinister and an adverse inference should be drawn or presumed from such conduct.

[48] In this regard, the plaintiff relied on the English Court of Appeal case of *Malhotra v. Dhawan* [1997] EWCA Civ 1096, [1997] 8 Med LR 319 where it was enunciated that parties to litigation need to preserve disclosable documents "as soon as litigation is contemplated". The case also highlights that an adverse presumption may be drawn if a party is responsible for the unavailability of documents because of its actions even before litigation was in contemplation, if that presumption is consistent with other available evidence (and there was a possibility of a claim at the time). Thus, where documents are no longer in a party's possession or where a party has disposed of documents or information relevant to a particular issue, the court, should, in an appropriate case, presume against that party when resolving the issue.

[49] In *Malhotra*'s case, there had been litigation as to the payment due on fees earned during the partnership. One party had destroyed the evidence which would have settled many issues. The court discussed the principle as to when an adverse presumption should be made against a destroyer of evidence. The principle that was established by that case was that if it is found that the destruction of the evidence was carried out deliberately so as to hinder the proof of the plaintiff's claim, then such finding will obviously reflect on the credibility of the destroyer. In such circumstances it would enable the court to disregard the evidence of the destroyer upon the application of the presumption.

[50] Secondly, if the court has difficulty in deciding which party's evidence to accept, then it would be legitimate to resolve that doubt by the application of the presumption.

[51] Thirdly, if the judge forms a clear view, having borne in mind all the difficulties which may arise from the unavailability of material documents, as to which side is telling the truth, then the presumption has no application and the judge cannot be required to accept evidence he does not believe or to reject evidence he finds to be truthful.

Court's Findings

[52] The first point to be made is that the statutory obligation under s. 245(3) of the Companies Act 2016 with regard to the obligation to keep the books and records of a company for seven years is clear and is mandatory.

[53] According to the defendants, the books and records of BSSB were disposed of after BSSB was wound up. Of course, to that extent, it has been admitted that the books and records of BSSB have been disposed of. However, the defendants have put a benign interpretation towards the issue of destruction of documents. It is noted that the destruction of documents only took place after the commencement of winding-up proceedings of BSSB. The defendants are deemed to have known the law, with respect to their statutory obligation to ensure that the books and records of BSSB are to be kept for seven years.

[54] In this regard, although in encl. 12, D4 said that he was unaware of the requirement under s. 167(2) of the Companies Act 1965, he nevertheless admitted during cross-examination that he was aware of the statutory requirement that documents and records must be kept for seven years. Clearly, D4 was not ignorant of the law. In any case, his prevaricating stand on his awareness of the statutory provisions necessarily impugns his credibility as a witness. I therefore hesitate to accept his assertions, explanation or justification per his affidavits filed in opposition to OS453.

[55] The defendants said that the liquidator told them that everything was in order. As such, they proceeded to destroy the books and records of BSSB. However, no evidence had been tendered to show that the liquidator had told the defendants that everything was in order. In any event, it is relevant to ask how could the liquidator have said that everything is in order since there is a "disconnect" between the balance sheet (which is unaudited) and the SOA.

[56] Be that as it may, it is necessary to consider the possibility and real likelihood that the liquidator may have wanted to check the documents (books and records) perhaps months or years later. It is up to liquidator to decide when he wishes to examine the books and records of BSSB. But the defendants have made that impossible since the books and records have all been destroyed.

[57] Hence, if the defendants wanted to destroy the documents due to storage costs, logically, they should have informed the liquidator first. They should have notified the liquidator of the intended destruction and asked the liquidator if the books and records of BSSB are still needed. In fact, it is not even known when the documents were destroyed, or whether they were really destroyed. There is also no information on how many documents are in question.

[58] I find it to be very bizarre for the directors of BSSB to destroy all the documents and records of the company. This raises a "red flag" of deep suspicion, particularly so in this case, where no paper trail can be done since there are no documents available. Nevertheless, the defendants are urging the court to conclude that there was nothing sinister in their action in destroying the documents and records of BSSB. The documents may very well have exonerated the defendants, but the defendants themselves have made that impossible since no documents are available now.

[59] The law on this aspect of the directors' obligation is very clear. The defendants are however, asking the court to give them the benefit of the doubt. But I find that the situation in the present case is far more compelling than the *Malhotra* case.

[60] Here, there is a statutory obligation on the part of the company pursuant to s. 245(3) of the Companies Act 2016 to retain and preserve the books and records of BSSB for seven years. I have not lost sight of the fact that BSSB was incorporated in late 2012 and thereafter wound up in 2015. BSSB was in existence for only around two to three years. And so, it is relevant to ask – how many documents could it have accumulated within that period? The whole case has pivoted critically on the issue of destruction of documents which by law, ought to have been preserved.

[61] I find it very odd (to say the least) that the documents and records were destroyed. The evidence given by D4 in the witness box is just oral evidence. In my view, the "smoking gun" lies in the documents. If the defendants did not want to keep or could no longer keep or store the documents, at the very least, they should have informed the liquidator and asked the liquidator if it was alright to destroy the documents.

[62] There is no evidence to substantiate the averment that the documents and accounts of BSSB had been destroyed due to the relocation of BSSB's offices. There is also no evidence to show that the documents and accounts could not have been kept on the premises or offices of the defendants, or on the number of documents and accounts being held by BSSB from its operations which were only for approximately two to three years.

[63] The defendants say that the availability of the documents and accounts would not make a difference in the plaintiff's attempt to recover the SC judgment. That is hardly a comforting response from parties who are by law, required to keep the documents and accounts of the company for a minimum of seven years. Had the documents and records been kept intact, at the very least, they would have enabled the liquidator to verify the expenses that were incurred and take steps to recover monies from all the debtors. It is also peculiar that the defendants had unilaterally decided to write off the debts owed to BSSB. In the absence of the documents and accounts, the so-called balance sheet remains merely as an "unaudited" piece of document which is not capable of any verification by the liquidator.

[64] Further, the liquidator cannot take action against BSSB's debtors to recover monies to satisfy the SC judgment since the relevant evidence to substantiate any claim have all been destroyed at the hands of the defendants. Consequently, based on all the circumstances attendant upon the conduct of the defendants as described herein, it is clear that there is no corroborative evidence of the defendants' stand or justification on the necessity and reasonableness of the expenses incurred by BSSB, the payment to all of the creditors of BSSB (except the plaintiff), the "fire-sale" assets and the writing off of the debts.

[65] In my view, based on the destruction of the books and records of BSSB (in violation of s. 245(3) of the Companies Act 2016) it is only proper in the circumstances that an adverse presumption should be inferred against the defendants, namely that the exorbitant expenses incurred by BSSB, the alleged payments made to all creditors, (except the plaintiff) and the writing off of debts owed to BSSB, are manifestation of fraudulent trading by the defendants. Taking all of the circumstances into account, the inference to be drawn here is that the books and records of BSSB were deliberately destroyed by the defendants to hinder and prevent the liquidator from ascertaining the truth as regards the financial affairs of BSSB and to verify the balance sheet and the reasonableness of the expenses that were incurred.

[66] On a final note, it is important to emphasise that the obligation on the defendants per s. 245(3) of the Companies Act 2016 is underscored by the penal consequences which follow if there is a breach of that statutory provision. In this regard, s. 245(9) of the Companies Act 2016 provides that:

> **245. Accounts to be kept**
>
> (9) The company and every officer who contravene this section commit an offence and shall, on conviction, be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both.

[67] I should of course clarify that this court is not being asked to determine whether the defendants are guilty of an offence under s. 245(9) of the Companies Act 2016 for failing to keep the documents of BSSB for seven years. This is not the right forum.

[68] In all the circumstances, on a balance of probabilities, I am impelled to find in favour of the plaintiff and I accordingly granted order in terms of prayers (1) and (2) of OS453, except that for prayer (2), the time for compliance is extended from 14 days to one month from the date of service of this order. Cost of RM10,000 is to be paid by the defendants to the plaintiff. (subject to 4% allocator fees).

Order accordingly.